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In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

KENNETH MOSES LOUD HAWK, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether time consumed by appellate review should be excluded from the length of delay relevant under the Speedy Trial Clause of the Sixth Amendment, where the government successfully appealed pursuant to 18 U.S.C. 3731 from orders dismissing the indictment and suppressing evidence, and respondents were free of all restrictions on their liberty during the appeals.

2. Whether delay attributable to respondents' interlocutory appeal should be considered in evaluating respondents' speedy trial claim.

3. Whether, even if time on appeal should be included under the Speedy Trial Clause, respondents' right to a speedy trial has been violated under the test of *Barker* v. *Wingo*, 407 U.S. 514 (1972).

PARTIES TO THE PROCEEDING

In addition to the parties shown in the caption, defendants Russ James Redner, Dennis James Banks, and Darlene Pearl Nichols, also known as KaMook Banks, were appellees below and are respondents herein.

Charges against defendant Leonard Peltier were severed from this action and later dismissed. Defendant Anna Mae Aquash is deceased.

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v.

KENNETH MOSES LOUD HAWK, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals affirming the dismissal of the indictment on the ground that respondents' right to a speedy trial was violated (App. 1a-25a) is reported at 741 F.2d 1184. The opinion of the court of appeals addressing respondents' vindictive prosecution claims (App. 26a-35a) is reported at 682 F.2d 841. The opinion of the en banc court of appeals reversing the district court's suppression order and dismissal of the indictment with prejudice (App. 36a-87a) is reported at 628 F.2d 1139. The panel opinion in that appeal (App. 88a-118a) is unreported. The district court's opinion dismissing the

indictment on speedy trial grounds (App. 119a-138a) is reported at 564 F. Supp. 691. The district court's orders on the vindictive prosecution motion (App. 139a-143a, 144a-148a), its bench ruling dismissing the indictment under Fed. R. Crim. P. 48(b) (App. 149a-151a), and its suppression order (App. 152a-157a) are unreported.

JURISDICTION

The judgment of the court of appeals (App. 158a-159a) was entered on August 30, 1984. A petition for rehearing was denied on January 8, 1985 (App. 160a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *.

STATEMENT

Respondents were apprehended on November 14, 1975 and charged on December 22, 1975, with unlawfully possessing and transporting dynamite and firearms. Because of protracted litigation over pretrial defense motions, respondents have yet to be tried. Twice, respondents convinced the district court to dismiss all or part of the indictment. Both times, the government prevailed in the court of appeals. Following the last remand, the district court once again dismissed the indictment, ruling that respondents' Sixth Amendment right to a speedy trial had been violated (App. 119a-138a). The court of appeals affirmed (*id.* at 1a-25a). A summary chronology of the complex

proceedings in this case is included at page 161a of the Appendix.

1. a. On November 13, 1975, the Federal Bureau of Investigation notified Oregon law enforcement authorities that federal fugitives might be traveling through the state in a motor home and station wagon. The FBI's teletype message described both vehicles and provided the license number of the motor home. The next day, Oregon state trooper Griffiths observed two vehicles fitting the FBI's description. After verifying the license number of the motor home, he stopped the vehicle and told its occupants to step outside. Former defendants Peltier and Aquash stepped out of the motor home, followed by respondent KaMook Banks and her infant child. Griffiths was told that no one else was inside. Just then the motor home accelerated quickly and Peltier fled, jumping over a nearby fence and exchanging gunfire with Griffiths. Griffiths then followed the motor home and found it one-half mile from the initial stop, with no one inside.[1] Meanwhile, another state trooper approached the station wagon, which had stopped behind the motor home, and ordered its occupants out of the car. Respondents Redner and Loud Hawk emerged. Both vehicles were locked and impounded while search warrants were obtained. App. 37a-40a.

Searches of the two vehicles pursuant to state and federal search warrants[2] disclosed 350 pounds of dynamite, 6 partially assembled time bombs, and a

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[1] The government would introduce evidence at trial showing that respondent Dennis Banks was the driver of the motor home. Banks was not arrested until January 26, 1976.

[2] State warrants were obtained and executed on November 15, 1975. Federal warrants were obtained and executed the following day. App. 40a & n.3.

loaded .44 caliber revolver in the station wagon, and 2600 rounds of ammunition, 150 blasting caps, 9 empty hand grenades, and 13 firearms, 8 of which had obliterated serial numbers, in the motor home. On November 16, 1975, Oregon state law enforcement officers removed the dynamite and destroyed it without consulting federal officials. App. 40a-42a & n.4, 45a-46a.

b. On December 22, 1975, a five-count superseding indictment was returned against respondents in the United States District Court for the District of Oregon. Clerk's Record (C.R.) 11-1. The first three counts charged respondents with unlawful possession and transportation of an unregistered and unnumbered destructive device, including seven cases of dynamite, along with timing devices and detonating materials, in violation of 26 U.S.C. 5861(d), (i) and (j), 5871. Count four charged respondents with unlawfully transporting firearms whose serial numbers had been obliterated, in violation of 18 U.S.C. 922(k).[3] Count five charged respondent Dennis Banks with possession of firearms by a convicted felon, in violation of 18 U.S.C. App. 1202(a).

2. a. On December 24, 1975, respondents filed a motion to dismiss the destructive device charges or, alternatively, to suppress any secondary evidence relating to the dynamite, because of its destruction by the state police (C.R. 17). On January 21, 1976, the trial was postponed until March 8, 1976, on the motion of respondents (C.R. 36, 37, 39). The court denied respondents' suppression motion on January 23, 1976 (C.R. 38), but thereafter granted their request

[3] Counts 1 through 4 also charged Peltier and Aquash. Peltier's case was severed and the charges against him later dismissed. Aquash is now deceased.

for reconsideration (C.R. 43) and ordered a pretrial evidentiary hearing. On respondents' motion and over the objection of the government, trial was again continued until May 12, 1976 (C.R. 62, 64).

Hearings on respondents' motion to dismiss or to suppress evidence of the dynamite were held on March 19 and 22, 1976 (C.R. 81, 85). The district court granted the motion on March 31, 1976, suppressing "all evidence, tangible and intangible, relating to" the dynamite (App. 157a). The government filed a notice of appeal from the suppression order on April 19, 1976 (C.R. 115), and sought a continuance of the May 12 trial date pending resolution of the appeal (C.R. 120, 121). The government repeatedly urged that its right to appeal would be vitiated if it were forced to go to trial before the appeal was decided and without the suppressed evidence (*e.g.*, C.R. 133, 136, 139; 4/26/76 Tr. 5-7). The continuance was denied by the district court, and a stay of trial was denied by the court of appeals.

When the case was called for trial on May 12, 1976, the government, consistent with its earlier representations, refused to proceed because of the pending appeal (App. 150a; C.R. 142). The district court thereupon dismissed the entire indictment with prejudice, invoking Fed. R. Crim. P. 48(b).[4] App. 151a; C.R. 142. The government immediately appealed from the dismissal (C.R. 149; 5/12/76 Tr. 12). The two appeals were consolidated and expedited

[4] Fed. R. Crim. P. 48(b) provides:

> If there is unnecessary delay * * * in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

(see App. 123a). Respondents were unconditionally released during the appeal (C.R. 142; see App. 151a).

b. The government filed its opening brief on June 28, 1976, and its reply brief on August 2, 1976. The appeal was argued and submitted on October 15, 1976 (App. 123a). A divided panel of the court of appeals affirmed on July 26, 1977 (*id.* at 88a-118a). The government's petition for rehearing with suggestion of rehearing en banc was filed on September 7, 1977, and granted on October 17, 1977 (*id.* at 123a). No further briefs were received by the court, nor was the case reargued. On March 6, 1978, the court of appeals remanded to the district court for an evidentiary hearing on whether federal officials participated in the destruction of the dynamite and whether respondents suffered any prejudice from its destruction (C.R. R-1;[5] App. 44a-45a, 123a). The court of appeals retained jurisdiction over the case and requested findings from the district court within 45 days (C.R. R-1, at 2; App. 45a). The district court held the hearing on May 9 and 10, 1978, and issued its findings on August 23, 1978 (*id.* at 123a).

On August 7, 1979, the court of appeals, sitting en banc, reversed the suppression order and ordered the dynamite counts reinstated (App. 36a-87a). The court also determined that while the government could have gone to trial on the firearms counts pending the appeal, the district court erred in dismissing those counts with prejudice (*id.* at 60a-62a). Accordingly, the court ordered that the district court reconsider its dismissal of those counts (*id.* at 62a).

[5] The designation "C.R. R-" refers to the numbering system used in the Clerk's Record after March 1, 1978.

Respondents' petitions for rehearing and certiorari were denied on October 1, 1979 and March 3, 1980 (445 U.S. 917), respectively. The mandate of the court of appeals issued on March 12, 1980, 46 months after the government took its appeal from the dismissal of the indictment (App. 4a).

3. a. On remand, the government contended that the firearms counts should be reinstated rather than presented again to a grand jury (4/14/80 Tr. 5). Respondents argued that those counts could not be reinstated (5/12/80 Tr. 6-7). On May 12, 1980, the court ordered the government to reindict on the firearms charges (5/12/80 Tr. 7). Following respondents' requests for continuances (C.R. R-41, R-45, R-50, R-51; 4/14/80 Tr. 9-10; 5/12/80 Tr. 14-15), the court set trial for September 3, 1980 (5/12/80 Tr. 20). Respondents stipulated that the pendency of numerous pretrial motions created excludable delay under the Speedy Trial Act (18 U.S.C. 3161 *et seq.*) running from March 17, 1980, the date the mandate was received, until all of the motions were decided (5/12/80 Tr. 18-19).[6] By April 24, 1980, at least 19 pretrial defense motions were outstanding (4/14/80 Tr. 9; C.R. R-33, R-37, R-39), and on that date respondents filed a motion requesting another two weeks for the filing of additional pretrial motions (C.R. R-41).

The grand jury returned a superseding indictment on June 18, 1980 (C.R. R-81). The new indictment

[6] At the time, the parties were under the misimpression that the mandatory dismissal sanction of the Speedy Trial Act applied to this case. See generally 18 U.S.C. 3163(c); *United States* v. *Watson*, 623 F.2d 1198, 1202 & n.8 (7th Cir. 1980).

charged respondents with two of three original destructive device counts and added two new destructive device counts. It charged respondents with the original firearms count (although it substituted "receiving" for "transporting") and again charged Dennis Banks with being a felon in possession of firearms. The indictment also charged KaMook Banks with a new count of receiving firearms while under indictment, in violation of 18 U.S.C. 922(h)(1).

Respondents filed a number of new motions in response to the superseding indictment (C.R. R-88, R-90, R-92, R-93, R-95-99, R-102, R-103, R-105), including a motion to dismiss on the ground of vindictive prosecution (C.R. R-97). On August 8, 1980, the district court granted the vindictive prosecution motion as to KaMook Banks and denied it as to the other respondents (App. 139a-143a, 144a-148a). Those respondents filed notices of appeal between August 15 and 22, 1980, and the government noticed an appeal from the dismissal of charges against KaMook Banks on September 2, 1980 (C.R. R-125, R-130, R-133, R-139). The appeals were consolidated and expedited (C.R. R-144-146, R-149). Respondents remained free during the appeal on their own recognizance.

b. Respondents filed their opening brief on October 15, 1980, and the government filed its brief on November 3, 1980. The appeal was argued and submitted on January 7, 1981. On July 29, 1982, the court of appeals reversed the dismissal of the indictment with respect to KaMook Banks[7] and dismissed

[7] The government did not contest the dismissal of the newly added count of receiving firearms while under indictment.

the interlocutory appeals of the other respondents for want of jurisdiction (App. 26a-35a; C.R. R-190).[8] Respondents' petitions for rehearing and certiorari were denied on October 5, 1982 and January 10, 1983 (459 U.S. 1117), respectively. The court of appeals' mandate issued on January 31, 1983, 29 months after the appeals were filed (App. 5a).

4. a. With trial set for June 13, 1983 (after one continuance obtained by the government and two ordered by the court on its own motion),[9] the district court, on May 20, 1983, dismissed the indictment a third time, ruling that respondents' Sixth Amendment right to a speedy trial had been violated (App. 119a-138a). The court also decided that the delay violated the Due Process Clause (App. 129a-130a n.7). The government filed a notice of appeal on June 17, 1983, and unsuccessfully urged the district court to request that the court of appeals expedite the appeal (C.R. R-268, at 2 n.3; 6/30/83 Tr. 14). As before, respondents were free of all restrictions during the appeal. Respondents have not been in custody since early 1976 (App. 9a, 136a; C.R. 43, 45, 50, 51).

b. The government's opening brief was filed on August 16, 1983, and its reply brief on September 27, 1983. The appeal was argued on January 4, 1984. A divided panel of the court of appeals affirmed on August 30, 1984 (App. 1a-25a).

[8] On June 28, 1982, this Court held that the courts of appeals are without jurisdiction to review interlocutory orders denying motions to dismiss on the ground of vindictive prosecution. *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263.

[9] App. 125a; C.R. R-196-198, R-223, R-225.

The court applied the four-part balancing test set forth in *Barker* v. *Wingo*, 407 U.S. 514, 530-533 (1972), assessing the length of the delay, the reasons for the delay, respondents' assertion of their right to a speedy trial, and the degree of prejudice to respondents. The majority counted the entire 90 months from the November 1975 arrests until the May 1983 dismissal as the relevant period of delay, including the entire length of time expended on the two earlier appeals, which consumed 75 of those 90 months (App. 11a). In counting the time on the government's appeals, during which charges had been dismissed, the court distinguished *United States* v. *MacDonald*, 456 U.S. 1 (1982), which held that the Speedy Trial Clause does not apply to periods when charges have been dismissed, on the ground that the dismissal in *MacDonald* was voluntary, while here the dismissals were over the government's objections (App. 8a). The court did not find it significant that respondents "were not incarcerated or subjected to other restrictions on their liberty during the time when the indictments had been dismissed" (*id.* at 9a).

Assessing the reasons for the delay, the majority counted against the government the court's own lengthy delay in deciding the first appeal (App. 12a-13a). The court found postponement of trial on the firearms counts "wholly unnecessary" and therefore weighed the appeal time heavily against the government with respect to those counts (*id.* at 12a). With respect to the dynamite counts, the court found that the government's appeal of the suppression order was clearly justified and that the delay was largely attributable to the court's own processes, a "neutral" reason that it weighed against the government, although not heavily (*id.* at 13a). The court purported to weigh the time spent on the second appeal against neither the government nor the defendants, although it did not excuse the delay, except for the six months spent on respondents' frivolous certiorari petition (*id.* at 14a-15a). The court considered the 23 months that the appeal was before it a reasonable time, involving "no * * * undue delay" (*id.* at 15a).

The majority also found that respondents had adequately asserted their right to a speedy trial (App. 15a). Finally, although the majority acknowledged that respondents had not suffered prolonged incarceration, it did find prejudice resulting from the pendency of unresolved charges and a slight amount of prejudice resulting from the deaths and fading memories of some witnesses (*id.* at 16a-17a). Balancing all of these factors, and concluding that "[t]he most weighty factor by far is the length of delay" (*id.* at 17a), the majority held that respondents' Sixth Amendment right had been violated (App. 18a). The court did not address respondents' due process claim.

In dissent, Judge Wallace concluded that *United States* v. *MacDonald*, *supra*, required exclusion from the length of delay of the time when no live indictment was outstanding (App. 19a-23a). Nor did he count the period during the interlocutory appeals by the respondents other than KaMook Banks (*id.* at 24a). The remaining time, between six months and one year for the various respondents, did not, in Judge Wallace's view, violate the Speedy Trial Clause (*id.* at 24a-25a).

REASONS FOR GRANTING THE PETITION

In this case, respondents were apprehended in November 1975 transporting a substantial arsenal of firearms, ammunition, and explosives, much of which it was illegal for them to receive, possess, or transport. After their repeated and partially successful efforts to avert or delay trial on the rather straightforward criminal charges growing out of this incident and to prevent the government from utilizing all of its available evidence in prosecuting those charges, respondents have—in what we regard as the ultimate irony—been rewarded with a ruling by the court of appeals that their constitutional right to a speedy trial was violated by the appellate litigation growing out of their various legally erroneous claims.

The decision below represents a significant departure from the standards established by this Court and followed by other courts of appeals in evaluating claims under the Speedy Trial Clause. More than six of the seven and one-half years of pretrial delay in this case are attributable to appeals taken by the government from orders dismissing the indictment and suppressing evidence, an interlocutory appeal taken by three of the respondents from the denial of their motion to dismiss, and respondents' petitions for rehearing and certiorari. Having repeatedly induced the district court to err, respondents cannot complain of the time necessary for the government to seek and obtain correction of those errors on appeal. And having determined to take an interlocutory appeal of an issue that is fully preserved for review following a final judgment of conviction, respondents similarly cannot complain of the time spent by the court of appeals in deciding their appeal.

The proper treatment under the Speedy Trial Clause of periods when a case is on appeal is a frequently recurring issue of considerable practical importance that has divided the courts of appeals. It is an issue lurking in every case where the government has taken an appeal pursuant to 18 U.S.C. 3731. The decision below departs from this Court's precedents, erroneously restricts the government's right to appeal, and adversely affects the public's interest in lawfully prosecuting criminal offenders. Further review is therefore warranted.[10]

1. In *Barker* v. *Wingo*, 407 U.S. 514 (1972), this Court established a balancing test to evaluate claims under the Speedy Trial Clause. The Court identified (407 U.S. at 530; footnote omitted) four relevant factors: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." When the government appeals in good faith from an order suppressing evidence or dismissing an indictment, the time spent on appeal should not be included in the computation of the length of delay.[11]

a. Where an indictment has been dismissed and the defendant is not subject to actual restraints on

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[10] The Speedy Trial Act's more stringent provisions have effectively mooted much litigation about the requirements of the Speedy Trial Clause of the Sixth Amendment as applied to federal prosecutions. That is not true, however, with respect to the present issue. Because time devoted to pretrial appeals is automatically excluded under the Act (see 18 U.S.C. 3161(d)(2) and (h)(1)(E)), the constitutional speedy trial guarantee governs this important issue.

[11] Alternatively, if appeal time is included within the length of the delay, it should be charged against the defendants when the government is successful on appeal or else wholly excused under the "reason for the delay" factor identified in *Barker* v. *Wingo*, *supra*.

his liberty, the Speedy Trial Clause does not apply. *United States* v. *MacDonald*, 456 U.S. 1 (1982). In *MacDonald*, the Court held that the Speedy Trial Clause did not apply to the period between the government's dismissal of charges and the defendant's indictment more than four years later. "Once charges are dismissed," the Court held, "the speedy trial guarantee is no longer applicable" (456 U.S. at 8; footnote omitted). This rule applies here to exclude the time on the government's appeals: no charges were outstanding against respondents during these periods, for the indictment had been dismissed by the district court, and respondents were unconditionally released during the appeals.[12] The government could not have tried respondents during these periods no matter how dearly it wanted to do so. Cf. *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967) (speedy trial guarantee applied where indictment was not discharged and case could be restored to docket on prosecutor's request); *Arnold* v. *McCarthy*, 566 F.2d 1377, 1383 (9th Cir. 1978) (following dismissal of indictment, defendant was not an "accused" who could demand a speedy trial). Hence, the Speedy Trial Clause does not apply. Respondents' claim should have been analyzed instead under the Due Process Clause. See *MacDonald*, 456 U.S. at 7; *United States* v. *Lovasco*, 431 U.S. 783 (1977); note 21, *infra*.

[12] The periods that should be excluded on this ground extend from May 12, 1976, when the indictment was dismissed as to all respondents, until the superseding indictment was returned on June 18, 1980, and, as to KaMook Banks, from August 8, 1980, when the superseding indictment against her was dismissed, until January 31, 1983, when the court of appeals' mandate issued.

The court below erred in distinguishing *MacDonald* on the ground that the government's dismissal of charges there was voluntary, while here the indictment was dismissed over the government's objection (App. 8a-9a). This Court's reasoning in *MacDonald* is fully applicable to the circumstances of this case (456 U.S. at 8-9):[13]

> The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.
>
> Once charges are dismissed, * * * the formerly accused is, at most, in the same position as any other subject of a criminal investigation.

[13] The Court nowhere suggested that its holding might be limited to voluntary dismissals. Indeed, the Court twice indicated its intent that the holding apply to all dismissals, including those entered over the government's objection. The Court stated (456 U.S. at 7 n.7) that its "holding agrees with the determination made by Congress in enacting the Speedy Trial Act of 1974 * * * that if charges are initially dismissed and later reinstated, the period between the dismissal and the reinstatement is not to be included in computing the time within which a trial must commence. 18 U.S.C. §§ 3161(d), 3161(h)(6)." Section 3161(d)(2) applies where an indictment dismissed by the district court is reinstated following appeal. In the same footnote, the Court noted that most of the courts of appeals had "also reached the conclusion that the period after dismissal of initial charges is not included" under the Speedy Trial Clause. One of the cases cited, *United States* v. *Bishton*, 463 F.2d 887 (D.C. Cir. 1972), held that the time attributable to the government's appeal from the dismissal of an indictment was not relevant for purposes of the Speedy Trial Clause.

> Certainly the knowledge of an ongoing criminal investigation will cause stress, discomfort, and perhaps a certain disruption in normal life. This is true whether or not charges have been filed and then dismissed. * * * But with no charges outstanding, personal liberty is certainly not impaired to the same degree as it is after arrest while charges are pending. * * * Following dismissal of charges, any restraint on liberty, disruption of employment, strain on financial resources, and exposure to public obloquy, stress and anxiety is no greater than it is upon anyone openly subject to a criminal investigation.

There were no live indictments outstanding against respondents during the government's appeals, and respondents were not subject to any restraints on their liberty. The government's appeals exposed respondents to the same "public obloquy, stress and anxiety" that would have been caused by any public knowledge of the government's interest in or consideration of criminal charges against them. Even where it is clear that the government intends to reindict or otherwise to pursue the case, the Speedy Trial Clause does not apply. See *United States* v. *Samples*, 713 F.2d 298, 301-302 (7th Cir. 1983) (Speedy Trial Clause not applicable to period between dismissal of indictment for improper venue and reindictment). Simply put, if there are no pending charges that can be tried, the Sixth Amendment does not require the impossibility of trying them speedily.

b. Even if the indictment has not been dismissed or the defendant is subject to arrest or bail pending appeal, the time attributable to government appeals from pretrial orders cannot be subjected to the strictures of the Speedy Trial Clause without severely restricting the government's right to appeal under 18

U.S.C. 3731 [14] and creating substantial practical difficulties. As the Court has consistently stated, "[t]he right of a speedy trial is necessarily relative. * * * It does not preclude the rights of public justice.'" *United States* v. *Ewell*, 383 U.S. 116, 120 (1966), quoting *Beavers* v. *Haubert*, 198 U.S. 77, 87 (1905). The government has a vital interest in securing appellate review of district court orders dismissing indictments and suppressing evidence. Such review can take place, consistent with the Double Jeopardy Clause, only prior to trial. The "deliberate pace" (*Ewell*, 383 U.S. at 120) of the criminal process is, with good reason, especially unhurried at the appellate stage. See *United States* v. *Bishton*, 463 F.2d 887, 890 (D.C. Cir. 1972) ("the function of appellate courts necessarily casts the delay attendant upon their deliberations in a somewhat different light"); see also *Harrison* v. *United States*, 392 U.S. 219, 221-222 n.4 (1968) (delays on appeal resulted from "the

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[14] 18 U.S.C. 3731 provides in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts suppressing or excluding evidence * * *, not made after the defendant has been put in jeopardy * * *, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.
>
> The appeal in all such cases * * * shall be diligently prosecuted.

need to assure careful review of an unusually complex case").

It would therefore make little sense to require that the appellate process proceed with the speed required by the Sixth Amendment. Cf. *Doescher* v. *Estelle*, 454 F. Supp. 943, 949-950 (N.D. Tex. 1978) (no Sixth Amendment right to a speedy appeal); 18 U.S.C. 3161(h)(1)(E) (delays resulting from interlocutory appeals excludable under the Speedy Trial Act).[15] The rule adopted by the court below could force the government to seek writs of mandamus from this Court to compel the courts of appeals to issue decisions once cases have been pending on appeal for a significant period. This unhappy and impractical result is hardly required, as the court below apparently believed (App. 13a), by this Court's reference in *Barker* v. *Wingo* (407 U.S. at 531) to delay caused by "overcrowded courts." Taken in context, that statement applies more naturally to trial court congestion than it does to appellate delay, where more time is spent reviewing legal issues than in waiting for a hearing date on a crowded calendar. Moreover, the Ninth Circuit overlooked a critical distinction in equating its own delays with delays due to trial court congestion—the latter are caused by circumstances beyond a defendant's control, whereas the appeals here were necessitated entirely by re-

[15] " '[I]t will be an unusual case in which the time limits of the Speedy Trial Act has been met but the sixth amendment right to a speedy trial has been violated.' " *United States* v. *Saintil*, 705 F.2d 415, 418 (11th Cir. 1983), quoting *United States* v. *Nance*, 666 F.2d 353, 361 (9th Cir. 1982). The policy dictating exclusion of appeal time under the Act, while not dispositive (see 18 U.S.C. 3173), therefore strongly suggests that appellate delay does not violate the Speedy Trial Clause.

spondents' legally erroneous contentions. In sum, where the government has, in good faith, taken an appeal under 18 U.S.C. 3731, the resulting delay should be excluded under the Speedy Trial Clause.[16] See generally *United States ex rel. Mitchell* v. *Fairman*, 750 F.2d 806, 809 (7th Cir. 1984) (22 months on appeal of suppression order not weighed against the state because "the state had every right to appeal" and "the appeal was not taken just for purposes of delay").

[16] The court of appeals faulted the government for refusing to go to trial on the firearms counts during the pendency of the appeal of the district court's order suppressing evidence of the dynamite (App. 12a; see pages 5-7, *supra*). But the government acted in good faith, and surely had no reason to anticipate that the court of appeals would take over three years to decide the appeal. Moreover, the firearms counts had not been severed from the dynamite counts—the government would have had to go to trial on all counts, thereby losing its right to appeal the suppression order. Cf. *United States* v. *Carey*, 746 F.2d 228, 230-231 (4th Cir. 1984), cert. pending, No. 84-1272 (exclusion of time under the Speedy Trial Act where counts are joined for trial and no severance motion has been granted). Accordingly, the time on appeal cannot weigh against the government, especially where the government was successful in reversing the district court's dismissal with prejudice. See generally *United States* v. *Saintil*, 705 F.2d at 418 (where government made a good faith mistake in interpreting district court's order, the delay attributable to its appeal should not be weighed heavily); *Jones* v. *Commonwealth*, 495 Pa. 490, 434 A.2d 1197 (1981) (delay attributable to government's unsuccessful interlocutory appeal did not violate speedy trial guarantee). Even if the period on the first appeal should be included with respect to the firearms counts, there is absolutely no reason to include that period with respect to the dynamite counts, where the government's appeal was concededly necessary because crucial evidence had been suppressed (App. 12a-13a).

c. Including appeal time within the length of delay under the Speedy Trial Clause—whether it be weighed lightly or heavily against the government—is especially inappropriate where, as here, the government has been successful on appeal. Having induced the trial court to err, respondents are in a poor position indeed to claim that their constitutional rights have been violated by the time needed for the government to obtain correct legal rulings from the court of appeals. If this time is to be included at all, it must be weighed against respondents. See *United States* v. *Brown*, 520 F.2d 1106, 1130-1131 (D.C. Cir. 1975) (MacKinnon, J., dissenting from denial of rehearing en banc). As the court stated in *People* v. *Jamerson*, 198 Colo. 92, 97, 596 P.2d 764, 768 (1979):

> Defendant's original motion to dismiss was not legally sustainable * * *. He cannot now use the fact that a trial court erroneously upheld his position to predicate an argument that an unreasonable delay took place because the prosecution appealed and obtained a reversal of the erroneous ruling.

See also *State* v. *Sieckmann*, 3 Or. App. 454, 459-460, 474 P.2d 367, 370 (1970) ("[s]ince defendant's motion to dismiss the original indictment was without merit, * * * and the resulting erroneous order of dismissal was the cause of the state's appeal, the defendant must share responsibility for the delay"); *State* v. *White*, 118 Ariz. 47, 56, 574 P.2d 840, 849 (Ct. App. 1977) (defendant's motion "is made in the context of the possibility of an appeal by the State if it is granted").

Excluding time resulting from a statutorily authorized appeal of the district court's grant of a defense

motion comports with the rule that the period necessary for the district court to consider such motions does not give rise to a Sixth Amendment violation:

> Having sought the aid of the judicial process and realizing the deliberateness that a court employs in reaching a decision, the defendants are not now able to criticize the very process which they so frequently called upon.

United States v. *Auerbach*, 420 F.2d 921, 924 (5th Cir.), reh'g denied, 423 F.2d 676 (1969), cert. denied, 399 U.S. 905 (1970); see also, *e.g.*, *United States* v. *Litton Systems, Inc.*, 722 F.2d 264, 270 (5th Cir. 1984), cert. denied, No. 83-1550 (May 14, 1984); *Scarbrough* v. *State*, 76 Wis. 2d 87, 99-103, 250 N.W. 2d 354, 360-361 (1977). Respondents caused most of the delay in this case by filing legally erroneous motions. Having set the judicial process in motion, they should not now reap the windfall of a dismissal under the Speedy Trial Clause predicated on the resultant delay.

d. The failure of the court below to exclude from the length of delay time attributable to the government's appeals conflicts with the decisions of other courts of appeals. In *United States* v. *Jackson*, 508 F.2d 1001, 1004 (7th Cir. 1975), for example, the court held that, "[i]n calculating the length of delay, * * * the period of delay attributable to review of an order appealable under 18 U.S.C. § 3731 should not be considered." Similarly, in *United States* v. *Bishton*, 463 F.2d 887, 890 (D.C. Cir. 1972), the court held that "the time spent on appeals is not generally included for purposes of calculating the period of delay." [17] In *United States* v. *Herman*, 576 F.2d 1139,

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[17] Although *Bishton* predates *Barker* v. *Wingo*, the court of appeals used a similar balancing test in assessing the

1146 (5th Cir. 1978), on which the court below erroneously relied (App. 11a), the court stated that it agreed with the principles expressed in *Jackson* and *Bishton*, and held that "[a]n interlocutory appeal by the government is generally a valid reason that justifies an appropriate delay." [18] Other courts have similarly held that time on government appeals may not be charged against the government in evaluating speedy trial claims. See *United States* v. *Litton Systems, Inc.*, 557 F. Supp. 568, 571 (S.D. Miss. 1983), rev'd on other grounds, 722 F.2d 264 (5th Cir. 1984), cert. denied, No. 83-1550 (May 14, 1984); *United States* v. *Sebastian*, 428 F. Supp. 967,

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defendant's speedy trial claim (see 463 F.2d at 889-890). In subsequent cases, the District of Columbia Circuit has been more reluctant to discount entirely the delay caused by appellate processes, citing this Court's language in *Barker* v. *Wingo* (407 U.S. at 531) that delay caused by overcrowded courts should be weighed lightly against the government. See *United States* v. *Sarvis*, 523 F.2d 1177, 1183 (D.C. Cir. 1975); *United States* v. *Brown*, 520 F.2d 1106, 1109 (D.C. Cir. 1975); *United States* v. *Perry*, 353 F. Supp. 1235 (D.D.C. 1973), aff'd mem. (D.C. Cir. Dec. 12, 1973). But see *United States* v. *Rosenbloom*, 511 F.2d 777 (D.C. Cir. 1974). In *Brown* and *Perry*, the only cases where the court found a Sixth Amendment violation, the defendants were incarcerated during parts of the delay and there was considerable delay in the trial court that was not justified. The court of appeals has never overruled *Bishton*.

[18] The court in *Herman* went on to analyze the propriety of the appeal more carefully because the defendant was incarcerated during the appeal (576 F.2d at 1146). After examining "the necessity of the appealed question to the government's case, the strength of the government's position on the issue, and the seriousness of the crime" (*ibid.*), the court held that the appeal was justified and the resulting delay could not be weighed against the government.

975 (W.D.N.Y.), aff'd, 562 F.2d 211 (2d Cir. 1977); *State* v. *Helenbolt*, 334 N.W.2d 400, 405 (Minn. 1983). But see *Atkins* v. *Michigan*, 644 F.2d 543, 548 (6th Cir.), cert. denied, 452 U.S. 964 (1981) (defendant incarcerated during appeal); *Chism* v. *Koehler*, 392 F. Supp. 659 (W.D. Mich. 1975), aff'd on opinion below, 527 F.2d 612 (6th Cir.), cert. denied, 425 U.S. 944 (1976) (same); *Day* v. *United States*, 390 A.2d 957 (D.C. 1978) (appeal not expedited). The conflict plainly warrants resolution by this Court.

2. The court of appeals clearly erred in failing to exclude from the length of delay the more than two years attributable to the interlocutory appeal taken by respondents (other than KaMook Banks) of the district court's denial of their motion to dismiss for vindictive prosecution. Although the court of appeals purported not to weigh this time against the government (App. 15a), it did count the time within the length of delay, to which the court gave virtually dispositive force (see *id.* at 17a). The time spent on the appeal before the court of appeals should have been entirely excused, as was the time attributable to respondents' frivolous certiorari petition following the dismissal of their appeal for want of jurisdiction under *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263 (1982).

In *United States* v. *Ewell*, *supra*, this Court held that defendants could be retried following a successful collateral attack on their convictions, notwithstanding a delay of 19 months between their original arrest and reindictment. The Court reasoned (383 U.S. at 121) that interpreting the Speedy Trial Clause to prohibit such delay would "seriously undercut" the policies underlying the settled interpreta-

tion of the Double Jeopardy Clause, which permits retrial following reversal of a conviction on appeal. Similarly, in *Harrison* v. *United States*, *supra*, the Court rejected (392 U.S. at 221-222 n.4) as "wholly without merit" the defendant's claim that he had been denied a speedy trial by lengthy delays on the successful appeals he had taken from his earlier convictions. The courts of appeals have also consistently held that time consumed on defendants' appeals does not count toward the length of delay for purposes of the Speedy Trial Clause. See *United States* v. *Bizzard*, 674 F.2d 1382, 1386 (11th Cir.), cert. denied, 459 U.S. 973 (1982); *United States* v. *Hill*, 622 F.2d 900, 909 (5th Cir. 1980); *Dandridge* v. *United States*, 265 F.2d 349, 350 (D.C. Cir. 1959); see also *In re Williams*, 393 N.E.2d 353 (Mass. 1979). The inclusion of defendants' appeal time, moreover, is inconsistent with the exclusion of time spent by the district court in deciding defense motions (see page 21, *supra*). The conflict over the proper treatment of time attributable to defendants' appeals, which is related to the treatment of government appeal time, should be resolved by this Court.

3. Finally, even if the court of appeals were correct in including appeal time within the length of delay, the court seriously erred in its applying the *Barker* v. *Wingo* balancing test to the facts of this case. The court of appeals' departure from the correct standard is so fundamental—and so closely related to its erroneous treatment of the time attributable to the government's and respondents' appeals [19]—that review by this Court is warranted.

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[19] As we have noted (page 13 & note 11, *supra*) the proper treatment of appeal time is either to exclude it entirely from the length of delay, or to excuse it or weigh it against the defendant as part of the reasons for delay, the second *Barker* v. *Wingo* factor, which is "[c]losely related to length of delay" (407 U.S. at 531).

Although the length of delay is but one of four relevant factors, the court of appeals gave almost conclusive weight to it (App. 17a). While we have argued above that a substantial portion of this delay—75 out of a total of 90 months—should be excluded altogether from the speedy trial analysis, even if it is included its significance must be substantially discounted by consideration of the other three factors. The reasons for the delay attributable to the government's appeals were clearly justifiable. After all, the government prevailed on those appeals. It is surely a Pyrrhic victory to be proven correct on appeal only to face, on remand, dismissal under the Speedy Trial Clause. And the time spent on respondents' own unsuccessful interlocutory appeal must, on any reasonable analysis, weigh heavily against them.

Prejudice to respondents is almost entirely absent here. In view of the fact that respondents "were incarcerated only for short periods, and were released without restriction during almost all of the period of delay" (App. 16a), the court below was able to conclude only that respondents had suffered "some" personal prejudice (*ibid.*). The court's conclusion (*id.* at 16a-17a) that respondents had suffered prejudice to their defense by the deaths and fading memories of witnesses is wholly speculative and ignores the simplicity of the underlying facts in this case. Respondents were caught red-handed, apprehended in the act of committing the crimes with which they were charged and in possession of the principal items of evidence that would be used to prove the government's case. Whatever prejudice has been caused by

the passage of time has been to the government's detriment, not respondents'.

The final factor, and the one that conclusively demonstrates the absence of a constitutional violation here, is respondents' obvious desire to avoid trial. The Court emphasized the importance of a defendant's desire to obtain a speedy trial in *Barker* v. *Wingo* (407 U.S. at 532, 536):

> We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.
>
> * * * * *
>
> [B]arring extraordinary circumstances, we would be reluctant indeed to rule that a defendant was denied this constitutional right on a record that strongly indicates * * * that the defendant did not want a speedy trial.

This case presents just such a record. Despite their pro forma demands for a speedy trial,[20] it must be obvious that, far from seeking trial at the earliest possible date, respondents were, from the very beginning, doing everything in their power to delay facing a trial (where, in light of the strength of the government's case, they would have little chance of prevailing). In addition to filing a plethora of pretrial motions at the beginning of the case as well as after

[20] Such demands are entitled to no weight. See, *e.g.*, *United States* v. *Jackson*, 508 F.2d at 1004. The courts below erred in relying (App. 15a, 135a) on respondents' expressed desire to go to trial on May 12, 1976—at a time when critical evidence against them had been erroneously suppressed—because the government had already clearly stated that it would not proceed on that date (see page 5, *supra*). Respondents' gratuitous demands therefore do not demonstrate an actual desire to go to trial.

each remand, respondents sought and obtained two continuances of the trial date during 1976 and attempted to obtain a third (C.R. 36, 37, 39, 62, 64; see C.R. 139), and again sought continuances following the court of appeals' remand in 1980 (see page 7, *supra*). Respondents also opposed or failed to join in the government's attempts to expedite the appeals (C.R. R-268, at 2 n.3; 8/12/80 Tr. 192-193).

Most telling are respondents' petitions for rehearing and certiorari following the court of appeals' ruling in favor of the government as to KaMook Banks and dismissal of the other respondents' appeals on the vindictive prosecution claim. That respondents would continue to seek interlocutory appellate review following this Court's dispositive decision in *Hollywood Motor Car Co.*, *supra*, holding that such relief is not available, irrefutably demonstrates respondents' manifest desire to avoid trial. The court of appeals' affirmance of the dismissal of the indictment in this case for violation of the Sixth Amendment cannot be squared with any value underlying the Speedy Trial Clause. See generally *United States* v. *Litton Systems, Inc.*, 722 F.2d at 272 (to hold that defendant's speedy trial right had been violated "would be a distortion and abuse of the right to a speedy trial under the Sixth Amendment, which was never intended to protect those who do everything in their power to delay or defeat the holding of a trial as long as possible").[21]

[21] The district court also held that respondents' due process rights had been violated (App. 129a-130a n.7). Although the court of appeals did not reach this issue, in the interest of preventing further delay and because resolution of the issue is so clear, we submit that it would be appropriate

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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for this Court to rule that there was no due process violation. The Due Process Clause protects the fundamental fairness of the proceeding; in this context, prejudice to the defense and the reasons for the delay are especially important. See *United States* v. *Lovasco*, 431 U.S. at 790, 796. Here, prejudice to respondents was minimal at best, and most of the delay was caused by respondents' own pretrial motions and the resulting appeals. On these facts, the district court's ruling that respondents were entitled to dismissal of the indictment under the Due Process Clause is legally insupportable.

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